BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TINA M. HAND	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,003,004
	)	
LEARJET, INC.	)	
Respondent	)	
Self-Insured	)	
	)	

ORDER

Claimant requests review of the September 2, 2004 Award by Administrative Law Judge (ALJ) John D. Clark. The Appeals Board (Board) heard oral argument on February 15, 2005.

APPEARANCES

Kevin T. Stamper of Wichita, Kansas, appeared for claimant. Matt Schaefer of Wichita, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations listed in the Award. The record also includes the medical records of Dr. Mitchel A. Woltersdorf entered by stipulation dated July 12, 2004.

ISSUES

The ALJ adopted the ten (10) percent whole body functional impairment rating of Dr. J. Mark Melhorn. After finding claimant made a good faith job search post accident, which has thus far been unsuccessful, he averaged claimant's actual 100 percent wage loss with Dr. Melhorn's 29 percent task loss opinion to conclude that claimant sustained

a 64.5 percent work disability resulting from injuries sustained on October 3, 2001 through October 5, 2001.

Respondent requests review of claimant's entitlement to work disability benefits based upon her actual post injury earnings. Respondent contends claimant has failed to make a good faith effort towards finding a job as required by *Foulk*[1] and *Copeland*.[2] Respondent argues that because of claimant's lack of a good faith job search she should have an appropriate wage imputed to her.

Respondent requests the Board to otherwise affirm the ALJ's Award, including the findings as to the percentage of functional impairment and task loss based upon the opinions of claimant's treating physician, J. Mark Melhorn, M.D. Respondent argues that Dr. Melhorn's opinions regarding claimant's work restrictions and the resulting task loss due to her upper extremity injuries are more credible and appropriate than the opinions of claimant's medical expert, Pedro Murati, M.D. Accordingly, respondent requests the Board to utilize the restrictions and task loss opinions of Dr. Melhorn, who found a 29 percent task loss with appropriate task rotation. Respondent believes the task loss opinions of Dr. Murati should be disregarded because he commingled his restrictions concerning claimant's low back with his restrictions for the injuries to claimant's upper extremities.[3]

Conversely, claimant agrees with the ALJ's conclusion that she made a good faith job search and is therefore entitled to a 100 percent wage loss but argues that the ALJ's Award should be modified to award a higher work disability based upon the restrictions and task loss opinions of Dr. Murati.

The nature and extent of claimant's disability is the only issue before the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant testified that on October 3, 2001, after returning to work following a back injury, she was asked to move from third shift to first shift in the same department and to

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[1] *Foulk v.Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994); *rev. denied*, 257 Kan. 1091 (1995).

[2] *Copeland v. Johnson Group, Inc.* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[3] The claimant's back injury is the subject of a separate workers compensation claim which was assigned Docket No. 250,594. Although both docketed claims were tried together and, consequently, the record contains evidence pertaining to both, this appeal does not involve the back, neck and shoulder injuries.

take on additional work tasks including sanding and hand forming. Claimant referred to this as "burring."[4] Claimant asserts that while working for three (3) days between October 3, 2001 through October 5, 2001, she developed symptoms with regard to her bilateral upper extremities, and was subsequently placed on medical leave of absence by respondent, effective October 5, 2001.[5]

The record contains the deposition testimony of Frederick R. Smith, D.O., who claimant first saw on May 28, 1999. She treated with him until September 14, 1999, at which time Dr. Smith believed claimant to be at maximum medical improvement and released her. Dr. Smith treated claimant for an injury she sustained on April 5, 1999 while employed with respondent. Dr. Smith's diagnosis for her April 5, 1999 injury was cervical, lumbar and thoracic strain. On September 14, 1999, Dr. Smith opined, based on the *Guides*[6] that claimant had a three (3) percent whole person impairment rating. He based this opinion on claimant's symptoms even though he could not find any true objective findings that he thought were related to her work injury of April 5, 1999.[7] At that time Dr. Smith also imposed permanent work restrictions of 15-pounds occasional lifting and to only sit and stand as tolerated. Dr. Smith also made an additional observation of delayed recovery syndrome and noticed claimant had a suspicion of physicians in addition to some possible symptom magnification. Due to claimant's suspicious behavior, Dr. Smith referred claimant to Mitchel A. Woltersdorf, Ph.D., a clinical and forensic neuropsychologist.

Claimant was interviewed by Dr. Woltersdorf on August 27, 1999, for a psychological evaluation. In his August 27, 1999 letter to Dr. Smith, Dr. Woltersdorf did not find any major psychological problems, such as depression, anxiety, post-traumatic stress syndrome or hysteria. Although he did not find symptom magnification, Dr. Woltersdorf opined that he did not think claimant's symptoms and complaints were consistent with her physical injuries and the findings in the reports of her prior medical examinations.

The record also contains the testimony of Philip R. Mills, M.D., who examined claimant on June 14, 2000. At that time Dr. Mills performed a physical examination, took claimant's history and reviewed prior medical records. Dr. Mills was requested to evaluate claimant's shoulders, low back and right knee. Dr. Mills found claimant to have elevation of the right shoulder with a pelvic obliquity with elevation on the left. Claimant had limited extension secondary to complaints of pain. Claimant had tenderness in the L4-5 and S1 paraspinal region and at the sacroiliac. Dr. Mills concluded claimant probably did not have

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[4]R.H. Trans. at 12 (May 11, 2004.)

[5]*Id.* at 19 and 20.

[6]American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[7]Smith Depo. at 22.

symptom magnification. Dr. Mills' diagnosis was low back sprain, bicipital tendinitis and possible subacromial bursitis versus rotator cuff irritation. Dr. Mills believed these conditions were related to her work injury on April 5, 1999. He believed there were multi-factorial and pre-existing problems such as bilateral carpal tunnel syndrome in 1991 work-related, a possible pars defect at L5 that was pre-existing and also some psychological possibilities with an elevated delusional scale found by Dr. Woltersdorf.

Dr. Mills' opined claimant was at maximum medical improvement on June 14, 2000, and imposed permanent work restrictions of avoid squatting, forward flexion greater than 30 degrees, observe good body mechanics, and rotate between sitting and standing on an "as needed" basis. Dr. Mills opined, based on the *Guides,* claimant had a six (6) percent permanent partial impairment to the whole body. Dr. Mills testified that is a cumulative total for impairment of different body parts. Dr. Mills explained claimant had an impairment from her left shoulder tendonitis for a one (1) percent impairment to the body as a whole and a five (5) percent whole body impairment for the low back sprain. Dr. Mills' believed claimant's knee problems were not related to the low back sprain. Dr. Mills testified that there was no evidence of actual symptom magnification. Dr. Mills did not offer an impairment rating opinion with regard to claimant's carpal tunnel syndrome condition.

As a result of the upper extremity injuries that are the subject of this claim, claimant was treated by J. Mark Melhorn, M.D., on December 6, 2001. Dr. Melhorn is a board certified orthopedic surgeon with a specialty in hands and upper extremities. Dr. Melhorn had previously treated claimant in 1992 through 1993 for symptoms in her right hand and wrist area. He also treated claimant for a mass on her right wrist area. Ultimately, claimant was released on April 13, 1993 following this treatment and given a rating of 5.9 percent permanent partial disability to the right forearm.

Dr. Melhorn noted that when he saw claimant for her current bilateral upper extremity complaints beginning on December 6, 2001, she reported that initially her pain was left hand and she subsequently developed a painful right hand.[8] Claimant described increasing numbness in the left thumb, index and middle fingers.[9] Based on claimant's examination, x-rays and nerve tests Dr. Melhorn found her symptoms were consistent with a diagnosis of carpal tunnel syndrome, left ulnar nerve entrapment at the elbow, painful right and left upper extremity and neurapraxia, which is altered sensation. Dr. Melhorn testified after utilizing conservative treatment measures including medications, injections and a modified work environment claimant continued to have symptoms. Ultimately, on January 15, 2002, Dr. Melhorn performed left carpal tunnel and left ulnar nerve release surgeries followed by a right carpal tunnel release surgery on January 29, 2002. Claimant continued to treat with Dr. Melhorn post operatively until April 10, 2002, at which time Dr.

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[8]Melhorn Depo. at 7.

[9] *Id.*

Melhorn concluded claimant was at maximum medical improvement. He rated claimant as having a 7.05 percent impairment to the right forearm for those symptoms related to the carpal tunnel syndrome. With regard to the left arm impairment Dr. Melhorn rated claimant at 9.45 percent to the elbow. Dr. Melhorn opined that based upon his last examination of claimant on April 9, 2002, he could not appropriately provide claimant with an impairment rating to her left shoulder based solely upon subjective complaints of pain.[10] The impairments rounded up to 10 percent to the body as a whole.[11] As for permanent work restrictions Dr. Melhorn recommended task rotation. He elaborated that this included changing activities involving the use of power tools and vibrating tools approximately every two hours.

Dr. Melhorn reviewed a task list compiled by Monty Longacre, based on claimant's prior 15 years work history. Dr. Melhorn concluded if claimant is able to perform the tasks following his permanent work restrictions of regular task rotation, she can perform 20 of the 24 identified individual job tasks for a 17 percent loss. But Dr. Melhorn testified that if claimant is unable to follow the restrictions of regular task rotation, then she is only able to perform 17 of her previous 24 job tasks, for a 29 percent loss[12]

At claimant's attorney's request she was evaluated by Pedro Murati, M.D., on September 18, 2002, regarding both her low back and her upper extremity complaints. Dr. Murati is board certified as a independent medical examiner. Dr. Murati issued one report with regard to the totality of claimant's complaints, and did not specifically break down his report or restriction recommendations as between claimant's low back and upper extremity complaints.

Dr. Murati opined that claimant is entitled to a ten (10) percent permanent partial impairment of function to her right upper extremity for the right carpal tunnel release, a three (3) percent impairment to her left shoulder for loss of range of motion, a ten (10) percent permanent partial impairment of function to the left upper extremity for the left ulnar decompression and an additional ten (10) percent permanent partial impairment of function to the left upper extremity as a result of the carpal tunnel release.[13] Combined with claimant's low back complaints, Dr. Murati awarded claimant a total permanent functional impairment of 30 percent to her body as a whole.[14]

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[10] *Id.* at 16.

[11] *Id.* at 9 and 10.

[12] *Id.* at 13 and 14.

[13] Murati Depo. at 9 and 10.

[14] *Id.* at 10.

Additionally, Dr. Murati restricted claimant from the use of hooks, knives, or vibratory tools with either hand, and limited her to only occasional heavy grasping for both hands, and limited repetitive grasping and grabbing with both hands to ten (10) pounds. Without differentiating between the restrictions associated with claimant's low back complaints and claimant's later upper extremity complaints, Dr. Murati opined that claimant has lost the ability to perform 14 out of 16 individual job tasks identified by Dan Zumalt in a separate job task evaluation.[15]

At the request of claimant's attorney claimant was interviewed by Dan Zumalt, on April 8, 2003. Mr. Zumalt is a private vocational rehabilitation vendor. Mr. Zumalt compiled a task list reflecting 16 non-duplicative tasks performed in the 15 years preceding her injury. Mr. Zumalt believed claimant retained the ability to earn at least minimum wage under her medical restrictions.[16] He further opined that he believed claimant retained the ability to perform clerking or clerical work, such as a clerk/cashier or some type of sedentary work.[17] He believed claimant could earn a wage of between $5.25 and $6.00 per hour, predicated upon a 40-hour work week.

On September 10, 2003, claimant was evaluated by Monty Longacre, a vocational rehabilitation counselor and job placement specialist. Mr. Longacre interviewed claimant regarding her prior 15 years work experience. Mr. Longacre concluded that claimant had engaged in 24 separate and distinct non-duplicative tasks over the 15 years preceding her October 2001 injury. Mr. Longacre criticized claimant's job search because she had been notifying potential employers about her work restrictions during the initial contact. Mr. Longacre also said that it would be inappropriate for claimant to attempt to find new jobs in the aircraft industry given the restrictions recommended for her by her physician, Dr. Murati. Mr. Longacre opined that claimant retained the potential to earn a post-injury wage of between $8.50 and $13.75 per hour, whereby claimant would experience a post-injury wage loss of between 25 and 54 percent.[18]

The ALJ determined claimant was entitled to a work disability. The permanent partial general bodily disability, or what is also known as "work disability" is defined at K.S.A. 44-510e and provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the scheduled in K.S.A. 44-510d and amendments thereto. **The extent**

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[15] *Id.* at 12 and Ex. 3.

[16] Zumalt Depo. at 14 and 15.

[17] *Id.* at 19 and 20.

[18] Longacre Depo. at 30.

> **of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment**. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk* [19] and *Copeland.* [20] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland,* the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post injury wage should be based upon the worker's ability to earn wages rather than the actual wages being received when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[21]

The Kansas Court of Appeals in *Watson*[22] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that

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[19] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev denied* 257 Kan. 1091 (1995).

[20] *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[21] *Id.* at 320.

[22] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder [sic] must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[23]

The claimant had already been off work for over a year when she began her job search in April 2002 soon after being released by Dr. Melhorn and about the time she was told by respondent that they could not accommodate her restrictions. At the time of the regular hearing on May 11, 2004, the claimant had still not found employment. At regular hearing the claimant provided a list of the prospective employers she had contacted regarding employment. The list indicates claimant averaged less than two contacts per week, after she began her job search.

Claimant testified that she was unable to return to work with respondent after her medical leave of absence commenced on October 5, 2001, and was notified in April 2002 that no work was available for her given her current medical restrictions.[24] Claimant asserts she made approximately 200 job contacts between April 2002 and May 2004. She only received one job offer which was with AGCO in Hesston, Kansas. Apparently, that job offer was rescinded before she started work.[25] Claimant testified that she had primarily been looking for work in the areas of aircraft manufacturing, retailing, medical and day care.[26]

In this case, limiting her job search efforts to approximately two contacts or less a week for two (2) years raises doubt about whether a meaningful attempt was being made to find employment. The number of job applications, while perhaps meeting the minimum number for unemployment compensation eligibility, strikes the Board as an effort on the part of the claimant to enhance her work disability claim rather than actually find a job. Claimant lives in a major metropolitan area, she is not in an area where the number of prospective employers is limited. If claimant was genuinely seeking employment it does not seem appropriate to limit her search efforts to only two contacts a week, particularly when her unemployed status continued on for so long. In addition, the claimant seems to have focused her efforts on businesses that were in her former area of expertise without

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[23] *Id.* at Syl. ¶ 4.

[24] R.H. Trans. at 13, 20 and 21.

[25] R.H. Trans. at 25.

[26] Hand Depo. at 34.

regard to whether the work was within her restrictions. Because of this, together with the limited number of contacts, the Board finds claimant has failed to make a reasonable effort to find the type of entry level positions in industries that pay less but which are more likely to be hiring. Claimant seems to have avoided areas such as food service, clerical and sales, where most jobs exist that she would be qualified and able to perform.

Accordingly, although the total number of job contacts that claimant has made could be considered minimally adequate, the Board is not persuaded that claimant has made a genuine effort to find appropriate employment in light of the fact that she resides in a metropolitan area and, thus, there were many more potential employers she could have contacted. When considering the entire record, the Board is not convinced that claimant's efforts in her job search were entirely genuine nor adequate. The Board concludes that under these facts and circumstances, claimant has failed to prove that she made a good faith effort to find appropriate employment.

Accordingly, the Board must impute a post-injury wage for purposes of the wage loss prong of the permanent partial general disability formula. The two vocational experts who testified in this matter, Mr. Zumalt and Mr. Longacre, offered opinions regarding the claimant's capacity to earn wages. Although there is evidence that she could potentially earn more, the Board finds that most of the jobs claimant is most likely to access, and the ones that were largely absent from her job search list, are those paying in the lower end of the wage scale, somewhere between minimum wage and $6.50 per hour. Generally, these jobs do not provide fringe benefits. The Board concludes claimant retains the ability to earn $240 per week. When compared to her stipulated preinjury average weekly wage of $733.27, this results in a wage loss of 67 percent. As this wage is not more than 90 percent of claimant's pre-injury average gross weekly wage the claimant is still entitled to a work disability and is not limited to her percentage of functional impairment. Averaging this 67 percent wage loss with her 29 percent task loss results in a work disability of 48 percent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated September 2, 2004, is modified as follows:

The claimant is entitled to 25.86 weeks of temporary total disability compensation at the rate of $417 per week or $10,783.62 followed by 193.99 weeks of permanent partial disability compensation at the rate of $417 per week or $80,893.83 for a 48 percent work disability, making a total award of $91,677.45.

As of March 9, 2005, there would be due and owing to the claimant 25.86 weeks of temporary total disability compensation at the rate of $417 per week in the sum of $10,783.62 plus 152.85 weeks of permanent partial disability compensation at the rate of $417 per week in the sum of $63,738.45 for a total due and owing of $74,522.07, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining

balance in the amount of $17,155.38 shall be paid at the rate of $417 per week for 41.14 weeks or until further order of the Director.

All other orders of the ALJ are adopted to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of March 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant
Matt Schaefer, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director